Supreme Court, U.S.
FILED
JUL 16 1993
OFFICE OF THE CLERK

No. 93-97

In The

Supreme Court of the United States

October Term, 1993

MAURICE RIND,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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10 2 pp

QUESTION PRESENTED

Can the United States Securities and Exchange Commission proceed without the restraint of any statute of limitations when bringing an action seeking the judicially-implied remedy of disgorgement for alleged past violations of § 10(b) of the Securities Exchange Act of 1934 when any other plaintiff would be barred by the statute of limitations announced by this Court in *Lampf, Pleva, Lipkind, et al. v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 115 L.Ed.2d 321, reh. den. ___ U.S. ___, 112 S.Ct. 27, 115 L.Ed.2d 1109 (1991)?

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

Importance of the Questions Presented 4

Factual Background and Allegations of the Complaint 7

Earlier Proceedings in this Case 7

ARGUMENT 10

I. THE SEC'S ACTION FOR MONETARY RELIEF AGAINST RIND IS BARRED BY THE STATUTE OF LIMITATIONS 10

A. Disgorgement Actions by the SEC Should be Subject to a Statute of Limitations, the Same as Actions by All Other Plaintiffs 10

B. The Limitations Periods of the 1933 and 1934 Acts, Including the Three-Year Period of Repose, Reflect a Balancing of Interests 14

C. The Judicially-Implied Remedy of Disgorgement Should be Subject to the Same Statute of Limitations As Is Monetary Relief When Sought in Securities Fraud Actions 16

II. THE FEDERAL COURTS HAVE A CONTINUING DUTY TO DEFINE THE BOUNDARIES OF § 10(b) ACTIONS 18

TABLE OF CONTENTS – Continued

Page

III. THE SEC'S ENFORCEMENT AUTHORITY UNDER § 20(b) OF THE 1933 ACT AND § 21(d)(1) OF THE 1934 ACT EXTENDS ONLY TO CONDUCT WHICH IS OCCURRING OR ABOUT TO OCCUR 20

IV. THE NINTH CIRCUIT ERRED IN HOLDING THAT GOVERNMENT ACTIONS ARE GENERALLY IMMUNE FROM ALL STATUTES OF LIMITATIONS 23

V. CONGRESS INTENDED TO IMPOSE A LIMITATIONS PERIOD 25

VI. ALTERNATIVELY, 28 U.S.C. § 2415 BARS THE SEC'S ACTION 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Aaron v. SEC, 446 U.S. 680, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980) 11

Deckert v. Independence Shares Corp., 311 U.S. 282, 61 S.Ct. 229, 85 L.Ed. 189 (1940) 22

Dole v. Local 427, Int'l. Union of Elec. Workers, 894 F.2d 607 (3d Cir. 1990) 23

Donovan v. West Coast Detective Agency, Inc., 748 F.2d 1341 (9th Cir. 1984) 23

Elkind v. Liggett & Meyers, Inc., 635 F.2d 156 (2d Cir. 1980) 22

Guaranty Trust Company v. United States, 304 U.S. 126, 58 S.Ct. 785, 82 L.Ed. 1224 (1938) 23

J.I. Case Co. v. Borak, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964) 24

Lampf, Pleva, Lipkind, et al. v. Gilbertson, ___ U.S. ___, 111 S.Ct. 2773, 115 L.Ed.2d 321, reh. den. ___ U.S. ___, 112 S.Ct. 27, 115 L.Ed.2d 1109 (1991) ..... *passim*

Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970) 22

Musick, Peeler & Garrett v. Employers Insurance of Wausau, ___ U.S. ___, 61 U.S.L.W. 4520 (June 1, 1993) 4, 5, 18, 19

Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977) 12, 13, 24

United States v. Summerlin, 310 U.S. 414, 60 S.Ct. 1019, 84 L.Ed. 1283 (1940) 23

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

15 U.S.C. § 77 ..... 2, 21

15 U.S.C. § 78 ..... 2, 3

28 U.S.C. § 1254 2

28 U.S.C. § 1292 2

28 U.S.C. § 2415 ..... 3, 6, 28, 29

28 U.S.C. § 2462 23

Securities Act of 1933 ..... *passim*

Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 ..... *passim*

Securities Exchange Act of 1934 ..... *passim*

Title VII of the 1964 Civil Rights Act 13

TEXTS

Bloomenthal, *Securities and Federal Corporate Law*, § 8.31[3][a] 25, 27

OTHER

1966 U.S. Cong. and Adm. News, pp. 2502-03 30

Senate Report No. 1328 29

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Maurice Rind prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed in this case on April 19, 1993, holding that no statute of limitations applies to an enforcement action brought by the United States Securities and Exchange Commission under Section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5 seeking disgorgement and other remedies for a defendant's alleged past violations of the securities laws. The Ninth Circuit opinion in this case is the first reported appellate decision which considers the claim by the Securities and Exchange Commission that the federal courts gave it the power to

pursue a judicially-created remedy for disgorgement, but cannot limit that power by application of a statute of limitations.

OPINIONS BELOW

The opinion of the Court of Appeals in this case is reported as *Securities and Exchange Commission v. Rind*, 991 F.2d 1486 (9th Cir. 1993), and is attached hereto as Appendix A at pp. App.1-App.16. The Order and Memorandum Opinion of the District Court for the Central District of California is reported as [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,168, and is attached hereto as Appendix A at pp. App.17-App.23.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The opinion of the Ninth Circuit was filed on April 19, 1993. This petition is filed within 90 days of that date and is therefore timely. (Supreme Court Rule 13.1.)

The district court has jurisdiction over this action pursuant to Section 22(a) of the Securities Act of 1933, 15 U.S.C. § 77u, and Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa. The district court entered an order regarding the issues for which petitioner now seeks

review by writ of certiorari, certifying them for interlocutory appeal on August 2, 1991.[1] A timely petition for interlocutory appeal was filed and the petition was granted by the Ninth Circuit on September 4, 1991. App.26. The opinion of the Ninth Circuit was filed on April 19, 1993.

STATUTES INVOLVED

This case involves sections 10(b) and 21(d)(1) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78j(b) and 78u(d)(1), sections 17(a) and 20(b) of the Securities Act of 1933 (the "1933 Act") (collectively, "the Acts"), 15 U.S.C. § 77q(a) and 77t(b), Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, and 28 U.S.C. § 2415.

[1] The exact issues certified for interlocutory appeal were phrased as follows:

> 1. Whether the action and/or request for disgorgement of the United States Securities and Exchange Commission is subject to a statute of limitations;
>
> 2. Whether defendant Maurice Rind is entitled to judgment on the pleadings or partial judgment on the pleadings based upon a statute of limitations; and
>
> 3. Whether Maurice Rind is entitled to trial by jury in an action brought by the United States Securities and Exchange Commission for disgorgement.

App.24-25.
Rind is not pursuing his claim to a jury trial in this petition.

STATEMENT OF THE CASE

Importance of the Questions Presented

This petition raises an important question of federal law in that the Ninth Circuit has refused to apply any statute of limitations to the judicially-created remedy of disgorgement in cases brought by the Securities and Exchange Commission (the "SEC") to enforce § 10(b) of the 1934 Act.

Congress did not give the SEC specific authority in the Acts to seek disgorgement for violations of § 10(b); this is a power which the SEC has accrued to itself purportedly through the general equitable power of the federal courts. The applicable statute only gives the SEC the specific authority to seek injunctions. Now for the first time, a federal court of appeals has had to consider the SEC's claim that the courts which found its implied authority to seek disgorgement cannot limit that authority by applying a statute of limitations, even one drawn from the federal securities laws. (The SEC also takes the position that laches would not be available as a defense.) The Ninth Circuit opinion begins by declaring this "an important issue of first impression," App.3, and it is in fact the first reported appellate decision on this issue.

The question presented in this petition has not been, but should be, settled by this Court in order to determine the proper scope of § 10(b) actions and to ensure that a uniform rule is applied to the SEC's actions throughout the nation. This petition presents a question analogous in importance to those recently addressed by this Court in *Musick, Peeler & Garrett v. Employers Insurance of Wausau*, ___ U.S. ___, 61 U.S.L.W. 4520 (June 1, 1993). There, the

Court held that a private right of contribution exists in § 10(b) actions, after declaring that "[t]he federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b-5 right and the definition of the duties it imposes." 61 U.S.L.W. at 4522.

In addition to the general importance of the question presented, a writ of certiorari is also necessary in this case because the Ninth Circuit's opinion conflicts with this Court's decision in *Lampf, Pleva, Lipkind, et al. v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 2782, 115 L.Ed.2d 321, reh. den. ___ U.S. ___, 112 S.Ct. 27, 115 L.Ed.2d 1109 (1991), where this Court held that "[l]itigation instituted pursuant to § 10(b) [of the 1934 Act] and Rule 10b-5 . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." A uniform statute of limitations on SEC actions for disgorgement would be consistent with and would complement this Court's recent efforts in *Lampf* and *Musick, Peeler & Garrett* to define the boundaries of § 10(b) litigation.

For the purposes of the proceedings which were held before the Ninth Circuit, and which are relevant to this petition, no factual issues are in dispute. The SEC alleges that defendant Maurice Rind ("Rind") participated in a securities fraud in violation of § 17(a) of the 1933 Act and § 10(b) of the 1934 Act more than three years prior to the date on which the SEC filed its initial complaint. Despite this lapse of time, the SEC seeks disgorgement and other relief against Rind. Rind denies liability, and has raised a statute of limitations defense.

Consistent with the reasoning of this Court in *Lampf*, the claims asserted by the SEC against Rind should be subject to a one/three year statute of limitations, and barred by the three year period of repose. The SEC contends that it can pursue the implied remedy of disgorgement unchecked by any statute of limitations, and can sue a defendant for monetary relief at any time, no matter how long ago the events giving rise to the action actually occurred, without the restraint of any statute of limitations or laches. The SEC's position that it has a limitless time to institute an action is unreasonable and thoroughly inconsistent with the statutory scheme of the Acts. In this regard, the SEC should be treated the same as any other litigant. All of the salutary effects of a statute of limitations noted by this Court in *Lampf* apply whether the plaintiff is the SEC or a private party. It is equally important that the issues be presented at a time when the necessary witnesses, documents, and other evidence are still available, regardless of the identity of the plaintiff. The impact which the SEC's complaint has upon a defendant is at least as great as that occasioned by a private party's litigation.

These factors are true no matter what relief the SEC seeks, but are particularly important where the government is seeking monetary relief. Even if the one/three year statute of limitations drawn from the Acts is not applied to SEC disgorgement cases, the general limitations period on federal governmental actions for money damages, 28 U.S.C. § 2415, imposes a three-year limitations period where, as here, the government is seeking monetary relief for alleged fraud under the rubric of "disgorgement."

Factual Background and Allegations of the Complaint

In January of 1988, Barry Minkow and others were indicted in connection with the ZZZZ Best Co., Inc. ("Z Best") debacle. All of these criminal defendants pled guilty or were convicted after trial. Rind was *not* named by the Department of Justice as a defendant in these proceedings. Almost three years after the indictments, and more than three years after Z Best's well-publicized collapse and bankruptcy filing, the SEC brought this belated complaint against Minkow and Rind, among others, alleging violations of the federal securities laws, including primarily § 10(b) of the 1934 Act and Section 17(a) of the 1933 Act.

As set forth in the SEC's First Amended Complaint, Rind is alleged to have committed securities violations in connection with the filing of Z Best registration statements in 1986 and a Z Best Form 10-Q in March 1987, more than three years prior to the filing of the original complaint. For reasons best known to the SEC, the SEC chose to seek disgorgement in the civil action solely from Rind and from no other defendant, in the amount of at least $700,000.00. Rind is the only remaining defendant.

Earlier Proceedings In This Case

The SEC filed its original complaint in this action, captioned *SEC v. Minkow, et al.*, on August 15, 1990. The SEC sought only injunctive relief against the other defendants, and obtained this by consent or default.

On October 1, 1990 Rind, as the only remaining defendant, timely moved to dismiss the complaint on,

among other grounds, the applicable statute of limitations. The district court granted Rind's motion with respect to the statute of limitations argument and gave the SEC leave to amend to replead the case solely against Rind. The SEC's motion for reconsideration was denied by the district court and on December 7, 1990, the SEC filed a First Amended Complaint. As it relates to Rind, the First Amended Complaint was materially identical to the prior complaint, and makes no new allegations relevant to any statute of limitations.

Rind again moved to dismiss on statute of limitations grounds, but the district court denied that motion on January 28, 1991. In denying the motion, the district court noted that the *Lampf* case was pending before this Court, and that it presented a statute of limitations issue with respect to federal securities fraud actions. The district court invited both Rind and the SEC to make appropriate motions following the *Lampf* decision.

On February 19, 1991, Rind timely answered the First Amended Complaint asserting various affirmative defenses including a fourth affirmative defense that the SEC's action was barred by the statute of limitations and a sixth, more specific affirmative defense, that the SEC's request for disgorgement was barred by the statute of limitations. The SEC thereafter moved to strike the affirmative defenses and, following briefing, that motion was denied.

This Court issued its decision in *Lampf* on June 20, 1991. Promptly thereafter, pursuant to the district court's invitation to the parties to brief the statute of limitations

issue following a decision in *Lampf*, Rind moved for judgment on the pleadings or partial judgment on the pleadings as to the disgorgement claim and the SEC renewed its motion to strike Rind's statute of limitations defenses.

On July 29, 1991, the district court granted the SEC's motion to strike Rind's fourth and sixth affirmative defenses and denied Rind's motion for judgment on the pleadings. At the same time, the district court judge stated that he would certify the question for interlocutory appeal if so requested. The district court ruled as follows:

> The parties have not suggested other limitations periods which may be applicable since defendant argues for the private action period and plaintiff argues for none at all. It may be that there is an overall limitations period susceptible to being applied to SEC actions. The court hopes so. That question is not posed on these motions.
>
> If either party desires, the court will certify this question for an interlocutory appeal, the court believing that it poses an [sic] controlling question of law as to which the correct answer is unclear.

Order and Memorandum Opinion, App.22-23.

Rind immediately applied *ex parte* for an order certifying issues for interlocutory appeal, and the district court granted certification on August 2, 1991. On August 12, 1991, Rind petitioned the Ninth Circuit for permission to appeal the statute of limitations issues and also a jury trial issue which had been certified for interlocutory appeal by the district court at the same time. The SEC did not oppose Rind's petition for permission to appeal, and stated in response to Rind's petition:

> The statute of limitations issue is significant, not only for this case but also for other Commission enforcement cases. The issue whether the statute of limitations that was applied in *Lampf, Pleva* governs Commission actions is being raised in a number of Commission cases. It would be useful to have a clear statement from this Court as to the proper resolution of this question.

Answer of Plaintiff SEC to Defendant's Petition for Permission to Appeal, pp. 3-4. On September 4, 1991 the Ninth Circuit granted Rind's Petition for Permission to Appeal, and issued its decision on April 19, 1993, after briefing and oral argument. The statute of limitations issues for which the SEC sought a "clear statement" from the Ninth Circuit are equally in need of a decision by this Court, so that litigants, both private and governmental, will better know the limits of the judicially-implied remedy of disgorgement in § 10(b) actions.

ARGUMENT

I.

THE SEC'S ACTION FOR MONETARY RELIEF AGAINST RIND IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Disgorgement Actions by the SEC Should be Subject to a Statute of Limitations, the Same as Actions by All Other Plaintiffs.

In *Lampf, supra,* this Court held that litigation instituted pursuant to § 10(b) of the 1934 Act and Rule 10b-5 must be commenced within one year after the discovery of the facts constituting the violation and within three

years after such violation. Absent a specific legislative enactment exempting the SEC from this statute of limitations, the SEC should enjoy no special judicial favor.

The SEC has argued unsuccessfully before this Court in the past that it is entitled to bring actions under § 10(b) based upon a lesser standard of liability than a private party must allege. In *Aaron v. SEC*, 446 U.S. 680, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980) the SEC argued that it was not required to allege and prove scienter when seeking injunctive relief in a § 10(b) case, unlike private plaintiffs. This Court disagreed, stating:

> In our view the rationale of *Hochfelder* ineluctably leads to the conclusion that scienter is an element of a violation of § 10(b) and Rule 10b-5 *regardless of the identity of the plaintiff or the nature of the relief sought*. Two of the three factors relied upon in *Hochfelder* – the language of § 10(b) and its legislative history – are applicable whenever a violation of § 10(b) or Rule 10b-5 is alleged, whether in a private cause of action for damages or in a Commission injunctive action under § 21(d). In fact, since *Hochfelder* involved an implied cause of action that was not within the contemplation of the Congress that enacted § 10(b), *id.*, at 196, it would be quite anomalous in a case like the present one, involving as it does the express remedy Congress created for § 10(b) violations, not to attach at least as much significance to the fact that the statutory language and its legislative history support a scienter requirement.

446 U.S. at 692, 100 S.Ct. at 1952-53 (footnotes omitted) (emphasis added).

The considerations supporting a statute of limitations, like those supporting a requirement of scienter, apply equally to actions brought by the SEC or a private party. The statute of limitations has the beneficial effect of requiring the SEC to institute suits within a reasonable period of time so that a case can be decided when the necessary witnesses, documents, and other evidence are still available and memories are reasonably fresh, just as it does when a private party is the plaintiff. This is particularly true for the three-year period of repose, which establishes an outside time limit on liability. Nothing in the statutory scheme of the Acts suggests a special exemption for the SEC.

In fact, in *Lampf*, this Court specifically refuted the argument that the Acts create a liability which is unlimited by any statute of limitations, when it distinguished securities fraud actions from those brought by the Equal Employment Opportunity Commission (EEOC). The *Lampf* majority opinion cited *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977) as one very rare occasion on which this Court has found that Congress did not impose any time limitation upon a federal cause of action, but rejected a similar conclusion with regard to securities fraud actions under the Acts:

> On rare occasions, this Court has found it to be Congress' intent that no time limitation be imposed upon a federal cause of action. *See, e.g., Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977). No party in the present litigation argues that this was Congress' purpose in enacting

> § 10(b), and we agree that there is no evidence of such intent.

Lampf, supra, 111 S.Ct. at 2778, fn. 3.

Occidental Life holds that the EEOC is not subject to any statute of limitations when it brings an action pursuant to Title VII of the 1964 Civil Rights Act, even though private litigants under that act are subject to a limitations period. This unusual conclusion was based upon a determination of Congressional intent with respect to the particular civil rights statute at issue and because of factors unique to that statute and to the EEOC.

Those factors included the EEOC's duty to notify those persons against whom an individual has made charges within 10 days after the charge is filed with the EEOC. This alerts potential defendants to the possibility of an enforcement suit, allowing them to take their own steps to investigate and preserve evidence while the events are fresh in the minds of witnesses. 432 U.S. at 371-72, 97 S.Ct. at 2457. By contrast, federal securities laws and regulations do not require the SEC to give potential defendants comparable timely notice to ensure fundamental fairness or to prevent them from being subject to the surprise and prejudice that can result from the prosecution of stale claims.

This Court also refused to apply a statute of limitations to the EEOC in *Occidental Life* because Congress had set up an administrative scheme requiring the EEOC to perform various mediation functions that would delay action and because Congress recognized that at the time of the enactment of the statute the EEOC had a backlog of cases. Neither of these considerations apply to the SEC.

The SEC has no mediation function which would impede its ability to act promptly, nor could the SEC have had a backlog of cases when the 1933 and 1934 Acts were enacted since these statutes created the SEC. Although it is true that the SEC may coordinate its civil enforcement actions with the Department of Justice to enable the institution of criminal proceedings, this does not prevent the SEC from acting in a timely fashion in civil actions.

The SEC has far more resources than most private litigants, and if private parties must respond within the three year period of repose, the SEC should be required to do so as well. No public purpose is served by encouraging the SEC to delay commencing a securities fraud action for over three years.

B. The Limitations Periods of the 1933 and 1934 Acts, Including the Three-Year Period of Repose, Reflect a Balancing of Interests.

In *Lampf, supra,* this Court held that litigation instituted pursuant to § 10(b) of the 1934 Act and Rule 10b-5 must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation. The Court recognized that the 1934 Act contemporaneously enacted a number of express remedial provisions designed to accommodate a balance of interests and policy considerations:

> In the present litigation, there can be no doubt that the contemporaneously enacted express remedial provisions represent "a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here – a statute that is, in fact, an analogy

> to the present lawsuit more apt than any of the suggested state-law parallels." *Del-Costello*, 462 U.S. at 169, 103 S.Ct. at 2293.
>
> The 1934 Act contained a number of express causes of action, each with an explicit limitations period. With only one more restrictive exception, [a 2-year period of repose for disgorgement of unlawful profits under § 16(b)] each of these includes some variation of a one-year period after discovery combined with a three-year period of repose. In adopting the 1934 Act, the 73d Congress also amended the limitations provisions of the 1933 Act, adopting the 1-and-3-year structure for each cause of action contained therein.

111 S.Ct. at 2780 (Footnotes omitted).

This Court's *Lampf* decision emphasizes that the three-year limit is a period of *repose*, which cannot be extended by equitable tolling:

> The 3-year limit is a period of repose inconsistent with tolling. One commentator explains: "[T]he inclusion of the three-year period can have no significance in this context other than to impose an outside limit." Bloomenthal, The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude, 60 U. Colo. L. Rev. 235, 288 (1989). See also ABA Committee on Federal Regulation of Securities, Report of the Task Force on Statute of Limitations for Implied Actions 645, 655 (1986) (advancing "the inescapable conclusion that Congress did not intend equitable tolling to apply in actions under the securities laws"). Because the purpose of the 3-year limitation is clearly to serve as a cutoff,

> we hold that tolling principles do not apply to that period.

111 S.Ct. at 2782.

The salutary purposes of a period of repose are equally frustrated by permitting governmental suits without time limitations, particularly for monetary relief, as they would be by permitting such suits by private plaintiffs.

C. The Judicially-Implied Remedy of Disgorgement Should be Subject to the Same Statute of Limitations As Is Monetary Relief When Sought in Securities Fraud Actions.

It is inconsistent with the reasoning of *Lampf* to imply a limitless time for the SEC to bring an action, particularly where as here, the SEC is seeking monetary relief under an authority it claims to have obtained through the federal courts. The concept behind a statute of repose is to provide a period of time after which an action simply cannot be brought. This should be particularly strongly applied where the SEC seeks monetary relief.

The SEC's complaint against Rind seeks monetary relief as "disgorgement." Nothing in the Acts specifically provides the SEC a right to "disgorgement" as a remedy to a § 10(b) violation; this right, if any, has been added by judicial gloss on the SEC's enforcement powers. This judicially-implied extension of the SEC's powers should be subject to a statute of limitations consistent with the statutory scheme of the Acts, as elucidated in *Lampf*. Creating an implied power for the SEC and exempting it

from all statutes of limitations would greatly undermine the period of repose applied in *Lampf*.

Since the entire private cause of action under § 10(b) is implied, the reasoning used in *Lampf* regarding private claims is equally applicable to the SEC's action for disgorgement, which is an implied remedy under § 10(b):

> The text of § 10(b) does not provide for private claims. Such claims are of judicial creation, . . . we have made no pretense that it was Congress' design to provide the remedy afforded. *See, Ernst & Ernst*, 425 U.S. at 196 ("[T]here is no indication that Congress, or the Commission, when adopting Rule 10b-5, contemplated such a remedy.") (footnotes omitted). It is therefore no surprise that the provision contains no statute of limitations.
>
> In a case such as this, we are faced with the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed. Fortunately, however, the drafters of Section 10(b) have provided guidance.
>
> *We conclude that where, as here, the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period.* We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related provisions.

(Footnotes and citations omitted.) (Emphasis added.) *Lampf, supra*, 111 S.Ct. at 2780.

The time limitations found in the Acts are consistently applied by this Court to both express and implied actions, and should continue to be consistently applied to the judicially-implied remedy of disgorgement.

II.

THE FEDERAL COURTS HAVE A CONTINUING DUTY TO DEFINE THE BOUNDARIES OF § 10(b) ACTIONS.

This Court recently reaffirmed that the federal courts have a duty to limit and define the boundaries of § 10(b) litigation in *Musick, Peeler & Garrett v. Employers Insurance of Wausau, supra*:

> Having implied the underlying liability in the first place, to now disavow any authority to allocate it on the theory that Congress has not addressed the issue would be most unfair to those against whom damages are assessed.
>
> We must confront the law in its current form. The federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b-5 right and the definition of the duties it imposes. As we recognized in a case arising under § 14(a) of the 1934 act, 15 U.S.C. § 78n(a), "where a legal structure of private statutory rights has developed without clear indications of congressional intent," a federal court has the limited power to define "the contours of that structure." *Virginia Bankshares, Inc. v. Sandberg*, ___ U.S. ___, ___ (1991). As to this proposition we were unanimous. 61 U.S.L.W. at 4522.

In holding that a right of contribution exists in § 10(b) actions, this Court noted the multiple responsibilities of the judiciary in interpreting the 1934 Act:

> [T]o ensure the action does not conflict with Congress' own express rights of action, [*Ernst & Ernst v. Hochfelder* (1976) 425 U.S. 185, 210], *to promote clarity, consistency and coherence for those who rely upon or are subject to 10b-5 liability*, [cf. *Blue Chip Stamps v. Manor Drug Stores* (1975) 421 U.S. 723, 737-44], and to effect Congress' objectives in enacting the securities laws, *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477-8 (1977). [Emphasis added.] 61 U.S.L.W. at 4523.

Justice Thomas' dissent in *Musick, Peeler & Garrett*, in which Justices Blackmun and O'Connor joined, argues against enlarging the scope of 10b-5 actions by approving suits for contribution, on the basis that the federal courts should avoid any unnecessary expansion of the boundaries of § 10(b) litigation: "[T]he 10b-5 action must be 'judicially delimited one way or another unless and until Congress addresses the question.' " *Musick, Peeler & Garrett*, 61 U.S.L.W. at 4524, quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 749.

The dissent specifically distinguishes the right to contribution, which establishes a separate cause of action, from a limitations period, which is an *integral* aspect of a cause of action, and therefore the proper subject for judicial interpolation:

> A limitations period is almost indispensable to a scheme of civil liability; even when federal law prescribes no express statute of limitations, we will not ordinarily assume that Congress intended no time limit. [Citation.] 61 U.S.L.W. at 4524.

III.

THE SEC'S ENFORCEMENT AUTHORITY UNDER § 20(b) OF THE 1933 ACT AND § 21(d)(1) OF THE 1934 ACT EXTENDS ONLY TO CONDUCT WHICH IS OCCURRING OR ABOUT TO OCCUR.

The Ninth Circuit concluded that this action against Rind is not subject to any statute of limitations in part because it found that the SEC brought the action pursuant to § 20(b) of the 1933 Act and § 21(d)(1) of the 1934 Act. App.8. Section 20(b) provides:

> Whenever it shall appear to the Commission that any person *is engaged or about to engage* in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, the Commission may in its discretion, bring an action in any district court of the United States, or United States court of any Territory, to enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

(Emphasis added.)[2]

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[2] Section 21(d)(1) contains similar language.

These sections of the Acts explicitly authorize only suits for injunctions, and do not mention any other remedy, other than referral to the Attorney General for possible criminal proceedings. The fact that § 20(b) and § 21(d)(1) do not contain their own statute of limitations is irrelevant to determining the appropriate period of repose for an action to recover money under the judicially-implied remedy of disgorgement.

To the extent that § 20(b) and § 21(d) provide any guidance, they suggest that Congress in enacting these provisions was focused on ongoing conduct or threatened future conduct. These sections authorize action only against a person who "is engaged or about to engage" in prohibited acts or practices. Enforcement actions designed to discourage or prohibit such practices are inherently limited by the statutory predicate of contemporaneous or imminent acts by the defendant. The fact that Congress did not add an explicit statute of limitations to this self-limiting provision does not permit the conclusion that an SEC action solely relating to past events is exempt from the statute of limitations and period of repose generally applied in the Acts.

Although the SEC's suit against Rind also requests an injunction, it primarily seeks monetary relief and is thus legal in nature. Even if actions for disgorgement are considered to seek a form of equitable relief however, they should not automatically be relieved from all statutes of limitations. In § 13 of the 1933 Act (15 U.S.C. § 77m), Congress has specifically imposed a one/three year statute of limitations on actions for rescission (an equitable remedy) based on violations of § 12 of the 1933 Act (15 U.S.C. § 77*l*). The statutory scheme of the Acts

therefore does not exempt the SEC from the statute of limitations for equitable remedies which are specified in the Acts. There is no reason why the federal courts should exempt the SEC from the statute of limitations for a remedy implied by the courts, even if it is characterized as "equitable."

It is worth noting that equitable relief is also available to private plaintiffs. *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287, 61 S.Ct. 229, 85 L.Ed. 189 (1940) ("We think the Securities Act does not restrict purchasers seeking relief under its provisions to money judgment. On the contrary, the Act as a whole indicates an intention to establish a statutory right which the litigant may enforce by such legal or equitable actions or procedures as would normally be available to him. . . . ") See also, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 386, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970) (equitable relief generally available under the 1934 Act).

Private litigants may even seek disgorgement under the federal securities laws. See, e.g. *Elkind v. Liggett & Meyers, Inc.*, 635 F.2d 156, 172 (2d Cir. 1980). Accepting the SEC's argument in this case that disgorgement actions are not subject to any statute of limitations would open the field to private litigants who could evade the three-year period of repose by characterizing their complaints as seeking "disgorgement" rather than money damages. This would effectively gut the *Lampf* decision and make questionable the application of any statute of limitations to § 10(b) actions.

IV.

THE NINTH CIRCUIT ERRED IN HOLDING THAT GOVERNMENT ACTIONS ARE GENERALLY IMMUNE FROM ALL STATUTES OF LIMITATIONS.

The Ninth Circuit's decision rests in part on the premise that the SEC's disgorgement action serves a "public purpose" which makes it immune from any statute of limitations under a line of cases including *United States v. Summerlin*, 310 U.S. 414, 60 S.Ct. 1019, 84 L.Ed. 1283 (1940) and *Guaranty Trust Company v. United States*, 304 U.S. 126, 58 S.Ct. 785, 82 L.Ed. 1224 (1938). App.10. These cases have no application here because they concern the effect of state statutes of limitations on state law causes of actions brought by the government. Rind's case concerns application of a federal statute of limitations to a federal law cause of action.

The remaining cases relied upon by the Ninth Circuit hold that the Department of Labor is not subject to a statute of limitations when suing for various purposes, but these actions primarily sought to enjoin behavior (*Dole v. Local 427, Int'l. Union of Elec. Workers*, 894 F.2d 607 (3d Cir. 1990)), or to compel specific acts (*Donovan v. West Coast Detective Agency, Inc.*, 748 F.2d 1341 (9th Cir. 1984)), not monetary relief. In addition, the statutory scheme of the Acts includes the all-encompassing statute of limitations and period of repose applied in *Lampf*, which does not exist in the field of federal labor law.

This action for disgorgement against Rind does not seek a civil fine, penalty or pecuniary forfeiture (for which a statute of limitations is provided at 28 U.S.C. § 2462), and is most accurately characterized as vindicating a right which a private party is entitled to vindicate in

its own right. It is therefore not an action in which the government is suing in its sovereign capacity.

This is an important distinction, as then-Justice Rehnquist pointed out in his dissent in *Occidental Life, supra,* reasoning that when the EEOC acts to vindicate a right which a private party may vindicate for himself, the United States is not suing in its sovereign capacity and the suit should not be exempt from the general application of state limitations statutes:

> Insofar as the EEOC seeks to recover back pay for individuals, it stands in the shoes of the individuals, and represents them in a suit the individuals would otherwise be entitled to bring, 42 U.S.C. § 2000e-5(f)(1) (1970 ed., Supp. V). Not only is the United States itself not a party to the suit, but the EEOC is vindicating a right which a private party was entitled to vindicate in his own right. Cf. *Alexander v. Gardner-Denver Co., supra,* 415 U.S., at 45, 94 S.Ct., at 1018. Since the United States is not suing in its sovereign capacity, there is no reason to exempt these suits from the general application of state limitations statutes. 432 U.S. at 381.

The general argument that the government is acting for a uniquely public purpose when it seeks to deprive an alleged violator of the law of allegedly ill-gotten profits proves too much, since any action to enforce the federal securities laws, by the government or by a private plaintiff, if successful, serves a similar "public purpose." In fact enforcement aspects of private actions under the Acts are well-recognized (*see*, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426, 432, 84 S.Ct. 1555, 1560, 12 L.Ed.2d 423 (1964)), and under the statutory scheme of the Acts are subject to

a statute of limitations and a period of repose. *Lampf, supra.*

V.

CONGRESS INTENDED TO IMPOSE A LIMITATIONS PERIOD.

In *Lampf* this Court concluded that the Congress which enacted the 1933 and 1934 Acts intended to impose a statute of limitations with a three-year period of repose. The legislative history of the Acts demonstrates that Congress was particularly concerned with the impact on potential defendants of an unlimited period of time for actions to be brought under the federal securities laws and that the statute of repose was included as a result of that concern.

Harold S. Bloomenthal, in his well-known treatise, *Securities and Federal Corporate Law*, examined the legislative history of the statute of limitations considered by the 73d Congress in passage of the 1933 and 1934 Acts.[3] Bloomenthal wrote:

> There is not much in the legislative history with respect to the initial limitation periods of Section 13 [of the 1933 Act][4] other than the bare

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[3] This Court cited to another Bloomenthal commentary with approval in *Lampf, supra,* 111 S.Ct. at 2782.

[4] Section 13 provides:

> LIMITATION OF ACTIONS
>
> No action shall be maintained to enforce any liability created under section 11 or section 12(2) unless brought within one year after the discovery of the

events described above. There is, however, considerable relevant legislative history relating to the Securities Exchange Act, including the Fletcher Amendments to the Securities Act noted above which gave Section 13 its present content. It is clear from this history that there was considerable organized opposition and much vocal opposition to the proposed Exchange Act in Congress. It is also clear that there had been a reaction to some of the civil liability provisions of the Securities Act and that the Fletcher Amendments were designed to meet some of the criticism of these provisions. It is also apparent that as a result of the campaign waged by Wall Street and others against the Exchange Act revisions were made both at the committee level (particularly in the House) and on the floor of the Senate to make the Act less objectionable to its critics . . .

There was a good deal of discussion as to what the outside period for bringing an action should be, and the Senate ultimately concurred with the three-year period proposed by the House. In part, this was out of concern that directors who might incur liability (particularly, under Sections 11 and 12(2) of the Securities Act) would be reluctant to serve in that capacity without a short period of repose which

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untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12(1), unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12(1) more than three years after the security was bona fide offered to the public, or under section 12(2) more than three years after the sale.

> *would give them some comfort that their estates would not be held liable several years later for their conduct in connection with the offering or sale of securities.*

See Bloomenthal, *Securities and Federal Corporate Law*, § 8.31[3][a], pages 8-156.4-7. (emphasis added).

It is particularly significant that the legislative history reflects that Congress did not limit itself to the customary concerns related to statutes of limitations (the risk of faulty recollection over extended time periods, discarded documentary evidence, etc.), but that Congress was specifically concerned with providing a potential defendant and his estate with the security of a statute of *repose* (not just a limitation period based solely on discovery) that would bring an end to the fear that he might be subject to a lawsuit years later. This fear, of course, would be no less if the SEC brought a lawsuit in the form of an action for disgorgement than if an individual brought an action for damages.

The statute of limitations applied in *Lampf* not only serves the Congressional purpose of providing a statute of repose to protect persons from stale actions, it also serves the purpose of all statutes of limitations – to limit the problems typically associated with litigation brought many years after the events, problems such as the failure of memory, difficulties in obtaining evidence, etc. In addition, as to the government, it serves the laudable purpose of prompting the government to take action reasonably promptly, not only to protect the rights of defendants but to assist investors on a timely basis. Congress acted in an entirely reasonable manner in not carving out an exemption for SEC prosecution of securities fraud cases.

VI.

ALTERNATIVELY, 28 U.S.C. § 2415 BARS THE SEC'S ACTION.

In the alternative, if a statute of limitations derived from the Acts themselves is not the appropriate statute of limitations, 28 U.S.C. § 2415 bars the SEC's action. Section 2415 generally provides a limitation on the time for commencing actions brought by the United States for money damages, unless otherwise provided by Congress, and fills in any legislative gaps in federal statutes which were enacted without specific limitations periods. Section 2415 provides in part:

> (b) Subject to the provisions of 2416 of this title,[5] and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or an agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues [subject to certain provisions not applicable to this case.]

Since an action for securities fraud is most analogous to a tort action for fraud, Section 2415 bars the SEC's

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[5] The only apparently even possible applicable provision under Section 2416 is subpart (c) which provides that for the purpose of computing the limitations period established in Section 2415, there shall be excluded all periods during which facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances. Here, despite leave to amend the complaint to assert late discovery, the SEC did not do so, and accordingly it must be concluded that the SEC could not assert late discovery under Section 2416(c).

action, in the absence of any more specifically applicable statute of limitations drawn from the federal securities laws. The legislative history of § 2415 contains the following description in Senate Report No. 1328:

> The purpose of the bill is to establish statutes of limitations which will apply to contract and tort actions brought by the United States. . . .
>
> Many of the contract and tort claims asserted by the Government are almost indistinguishable from claims made by private individuals against the Government. *Therefore it is only right that the law should provide a period of time within which the Government must bring suit on claims just as it now does as to claims of private individuals.* The committee agrees that the equality of treatment in this regard provided by this bill is required by modern standards of fairness and equity.
>
> *Statutes of limitations have the salutary effect of requiring litigants to institute suits within a reasonable time of the incident or situation upon which the action is based. In this way the issues presented at the trial can be decided at a time when the necessary witnesses, documents, and other evidence are still available. At the same time, the witnesses are better able to testify concerning the facts involved for their memories have not been dimmed by the passage of time.* The committee feels that the prompt resolution of the matters covered by the bill is necessary to an orderly and fair administration of justice. Stale claims can neither be effectively presented nor adjudicated in a manner which is fair to the parties involved. Even if the passage of time does not prejudice the effective presentation of a claim, the mere preservation of records on the assumption that they will be required to

> substantiate a possible claim or an existing claim increases the cost of keeping records.

1966 U.S. Cong. and Adm. News, pp. 2502-03 (emphasis added).

CONCLUSION

Disgorgement is a judicially-created remedy under § 10(b) of the Securities and Exchange Act, but the Ninth Circuit has abdicated necessary supervisory responsibility and given the SEC complete license to bring actions for disgorgement no matter how many years may have passed between the date of the allegedly fraudulent activity and the date of the SEC's complaint. The Ninth Circuit's opinion is the first reported appellate decision on this important federal issue and directly conflicts with the several statutes of limitations included by Congress in the federal securities laws, and with this Court's decision in *Lampf*, all of which point to the importance of the three-year statute of repose. For these reasons, Rind respectfully requests that a writ of certiorari issue to review the decision of the Ninth Circuit in this case.

Dated: July 16, 1993

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION, *Plaintiff-Appellee,* v. MAURICE RIND, *Defendant-Appellant.*	No. 91-55972 D.C. No. CV-90-4361-HLH OPINION

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted
November 4, 1992 – Pasadena, California

Filed April 19, 1993

Before: J. Clifford Wallace, Chief Judge, Stephen S. Trott and Thomas G. Nelson, Circuit Judges.

Opinion by Chief Judge Wallace

SUMMARY

Civil Litigation and Procedure/Statutes of Limitation/Juries

The court of appeals affirmed an order of the district court. The court held that no limitations period was available to a defendant in a civil enforcement action by the Securities and Exchange Commission under the Securities

Acts of 1933 and 1934 for injunctive relief and disgorgement of unlawful gains. The court also held that in such an action there was no right to a jury trial.

Appellee Securities and Exchange Commission brought a civil enforcement action against appellant Maurice Rind pursuant to the 1933 and 1934 Acts, seeking injunctive relief and disgorgement of unlawful gains from various securities violations. Rind contended that the latest date at which the Commission should have been on notice of fraud was more than three years before its suit was filed. He based a motion for judgment on the pleadings on a limitation of actions defense derived from a recent Supreme Court decision imposing a similar limit on certain implied private rights of action under the 1934 Act. Rind also made a demand for jury trial.

The district court granted the Commission's motion to strike Rind's limitations defense and denied his motion. The court also granted the Commission's motion to strike the jury demand on the ground that disgorgement was an equitable remedy. The Court certified the two questions for interlocutory appeal.

COUNSEL

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Jacob H. Stillman, Associate General Counsel, Washington, D.C., for the plaintiff-appellee.

OPINION

WALLACE, Chief Judge:

This interlocutory appeal raises an important issue of first impression: what, if any, statute of limitations applies to a civil enforcement action brought by the Securities and Exchange Commission (Commission). We must also decide whether the right to a jury trial guaranteed by the Seventh Amendment attaches where the Commission sues for disgorgement of illegal profits. The district court held that the Commission was not bound by a statute of limitations and that Rind did not have a right to a jury trial. The district court had jurisdiction pursuant to 15 U.S.C. §§ 77v(a), 78u(e), and 78aa. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1292(b). We affirm.

I

On August 15, 1990, the Commission filed a civil enforcement action against Rind and 13 other defendants pursuant to section 20(b) of the Securities Act of 1933 (1933 Act), 15 U.S.C. § 77t(b), and section 21(d) of the Securities and Exchange Act of 1934 (1934 Act), 15 U.S.C. § 78u(d). The complaint alleged that Rind and his co-defendants had engaged in securities fraud and had violated various reporting and recordkeeping provisions of the federal securities laws in connection with the well-publicized collapse of ZZZZ Best Company (Z Best). Rind is the only defendant left in this case; 12 consented to judgments against them, and the other defaulted.

In its first amended complaint, the Commission alleges that Rind concocted a fraudulent transaction which allowed Z Best to overstate its assets vastly, thereby enabling the company to raise millions of dollars in capital. The Commission asserts that Rind received at least $700,000 for his efforts. The alleged overstatement of Z Best's assets was contained in the company's registration statements, in violation of section 17(a) of the 1933 Act. 15 U.S.C. § 77q(a), section 10(b) of the 1934 Act. 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule (Rule) 10b-5, 17 C.F.R. § 240.10b-5 (1992). Rind was also charged with aiding and abetting various reporting and recordkeeping violations by the company, in violation of sections 13(a) and (b)(2) of the 1934 Act, 15 U.S.C. §§ 78m(a) and (b)(2), and Rules 12b-20, 13a-13, and 13b2-1, 17 C.F.R. §§ 240.12b-20, 240.13a-13, and 240.13b2-1 (1992). The Commission seeks a permanent injunction prohibiting Rind from violating these provisions in the future and requiring disgorgement of any unlawful gains.

The district court granted the Commission's motion to strike Rind's jury demand on the ground that disgorgement is an equitable remedy. The court also granted the Commission's motion to strike Rind's statute of limitations defenses and denied his motion for judgment on the pleadings based on the statute of limitations. The district court certified the statute of limitations and jury trial questions for interlocutory appeal, and we granted Rind permission to appeal.

II

Congress provided the Commission with express statutory authority to administer and enforce the 1933 and 1934 Acts. *See* § 20 of the 1933 Act, 15 U.S.C. § 77t; § 21 of the 1934 Act, 15 U.S.C. § 78u. It did not, however, explicitly subject the Commission to a statute of limitations. Our task is to interpret what Congress meant by this silence.

Relying on the Supreme Court's recent decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991) (*Lampf*), Rind argues that Congress intended a one-year statute of limitations with a three-year period of repose to govern civil enforcement actions brought by the Commission. He asserts that the latest that the Commission should have been put on notice of a potential fraud by Rind would have been in July 1987, when Z Best filed for bankruptcy. Because this was over three years before the Commission filed its initial complaint, Rind argues that the Commission's action against him is time barred.

Without disputing the chronology offered by Rind, the Commission responds that it is not subject to any limitations period. We review de novo the district court's ruling on the appropriate statute of limitations. *Felton v. Unisource Corp.*, 940 F.2d 503, 508 (9th Cir. 1991).

A.

Lampf involved a dispute between a group of disgruntled investors in tax-shelter partnerships and a law

firm that had helped organize the partnerships and prepared opinion letters addressing the tax consequences of investing in the partnerships. 111 S. Ct. at 2776. The investors charged the law firm with misrepresenting the value of the partnerships and brought suit under section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder. *Id.* at 2776-77.

The text of section 10(b) does not provide for private rights of action. Such "implied" claims owe their genesis to the courts and not Congress. The Court thus was "faced with the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed." *Id.* at 2780.

In order to determine what statute of limitations Congress would have adopted had only it thought to create a private right of action under section 10(b), the Court turned to the securities laws themselves. It concluded that "where, as here, the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period." *Id.* A court should borrow a state limitations provision only where the statute of origin does not yield an analogous federal rule. *Id.*

Congress imposed an explicit statute of limitations for each of the private claims created by the 1933 and 1934 Acts. With one exception, each of these provides for a one-year time period after discovery of the alleged securities violation combined with a three-year period of repose. *See* § 13 of the 1933 Act, 15 U.S.C. § 77m; §§ 9(e) and 18(c) of the 1934 Act, 15 U.S.C. §§ 78i(e) and 78r(c).

The single exception is section 16(b) of the 1934 Act, 15 U.S.C. § 78p(b), which only provides for a two-year period of repose. Along with these claims, section 10(b) formed part of a "complex web of regulations." *Lampf*, 111 S. Ct. at 2781. Together, these provisions promoted the "central goal" of the securities laws: to protect investors from stock manipulations and to impose regular reporting requirements on publicly-traded securities. *Id.* Against this statutory backdrop, the Court reasoned that the 1-and-3 year structure best reflected how Congress would have balanced the policy considerations at play in litigation under section 10(b). *See id.* at 2780-81.

The Court thus concluded that "[l]itigation instituted pursuant to § 10(b) and Rule 10b-5 . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Id.* at 2782. Because the investors in *Lampf* had filed suit more than three years after the alleged misrepresentations, the Court declared that their claims were untimely. *See id.*

Although acknowledging that *Lampf* itself only involved private litigants, Rind asserts that when the Commission sues for disgorgement it is seeking money damages in the same manner as any private plaintiff. He therefore contends that the Commission should be bound by the same statute of limitations: one year with a three-year period of repose.

The plain language of *Lampf* suggests otherwise. At the outset of its opinion, the Court stressed that the only issue before it was "which statute of limitations is applicable to a *private* suit brought pursuant to" section 10(b)

and Rule 10b-5. *Id.* at 2776 (emphasis added). The opinion derived a statute of limitations for private rights of action under section 10(b) from the other private rights of action contained in the securities laws. At no point did the Court discuss civil enforcement actions brought by the Commission, More importantly, there is no "awkwardness" here: the Commission's enforcement powers are a product of congressional design and not judicial imagination. Unlike a private litigant, the Commission does not sue under Section 10(b). Rather, the Commission has express authority to enforce section 10(b) and the other provisions of the 1934 Act pursuant to section 21 of that Act. *See* 15 U.S.C. § 78u. There is no reason to assume that an opinion discussing private claims under section 10(b) covers public enforcement suits brought under an entirely different section of the 1934 Act.

Nor does the reasoning of *Lampf* support Rind's argument. In *Lampf,* the Court determined that the choices Congress made in limiting the express private actions in the securities laws provided a close approximation of how Congress would have balanced the policy considerations implicit in selecting a statute of limitations for private litigation under section 10(b). *See* 111 S. Ct. at 2780-81. These private limitations periods, however, do not adequately reflect the different interests at stake where the Commission seeks to enforce the securities laws. Although private claims play an undeniably important role in the enforcement of the securities laws, they are brought for entirely private ends. Private damages actions focus narrowly on how much the individual lost as a result of the illegal conduct and whether that injury can be reasonably quantified.

In contrast, the Commission sues as part of its statutory mandate to enforce the federal securities laws. As such, civil enforcement actions promote economic and social policies independent of the claims of individual investors. The fact that disgorgement involves money does not change the nature of the remedy. The Commission seeks disgorgement in order to deprive the wrongdoer of his or her unlawful profits and thereby eliminate the incentive for violating the securities laws. The theory behind the remedy is deterrence and not compensation. *See SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972 (*Manor Nursing*); *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 599 (E.D. Pa. 1976). Indeed, a district court may grant the Commission's request for disgorgement even where no injured investors can be identified. *See SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985). In light of the important public function served by Commission enforcement activity, we therefore cannot conclude, as did the Court in *Lampf*, that the express time limits for private claims "accommodate a balance of interests very similar to that at stake here." 111 S. Ct. at 2780 (internal quotation omitted).

B.

Having determined that *Lampf* does not control the disposition of this case, we must ask whether any limitations period governs Commission enforcement actions. Our analysis begins with the structure of the securities laws themselves. In the 1933 and 1934 Acts, Congress developed a comprehensive plan to regulate the securities markets. As part of that plan, Congress created a number of private claims, each bound by an express

statute of limitations. At the same time, and in the same acts, Congress granted the Commission broad power to enforce the substantive provisions of the securities laws but refrained from imposing an explicit time limit on Commission enforcement actions. Congress clearly devoted its time and attention to limitations issues. The fact that it did not enact an express statute of limitations for lawsuits instituted by the Commission, therefore, must be interpreted as deliberate.

Canons of statutory interpretation bolster the conclusion implicit from the structure of the 1933 and 1934 Acts. Congress often fails to supply an express statute of limitations when it creates federal claims. In these circumstances, the Supreme Court generally has inferred that Congress intended by its silence that the courts should "borrow" the most analogous state limitations period. *See Reed v. United Transp. Union*, 488 U.S. 319, 323-24 (1989). This rule, however, does not apply without exception. *Id.* at 324.

State limitations periods do not bind the United States when it sues to vindicate a public right or interest, absent a clear showing of congressional intent to the contrary. *See United States v. Summerlin*, 310 U.S. 414, 416-17 (1940); *Dole v. Local 427, Int'l Union of Elec. Workers*, 894 F.2d 607, 610 (3d Cir. 1990) (*Local 427*). This doctrine, which has its origins in the ancient principle that time does not run against the king, finds its modern justification in the policy that public rights, revenues, and property should not be forfeited due to the negligence of public officials. *See Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938). Applying this rule, this and other circuits have concluded that various types of actions by

government officials are not subject to state, or indeed any other, limitations periods. *See Local 427*, 894 F.2d at 610-16 (no statute of limitations applies when Secretary of Labor sues under Labor-Management Reporting and Disclosure Act (LMRDA) to enjoin local union from refusing to allow one of its members to review collective bargaining agreements); *Donovan v. West Coast Detective Agency, Inc.*, 748 F.2d 1341, 1343 (9th Cir. 1984) (no statute of limitations applies when Secretary of Labor sues under LMRDA to compel filing of requisite reports); *Donovan v. Square D Co.*, 709 F.2d 335, 341 (5th Cir. 1983) (no statute of limitations applies when Secretary of Labor brings an anti-retaliation suit under Occupational Safety and Health Act); *Marshall v. Intermountain Elec. Co.*, 614 F.2d 260, 263 (10th Cir. 1980) (same); *Nabors v. NLRB*, 323 F.2d 686, 688-89 (5th Cir. 1963) (no statute of limitations applies when National Labor Relations Board enforces the National Labor Relations Act), *cert. denied* 376 U.S. 911 (1964).

When the Commission sues to enforce the securities laws, it vindicates public rights and furthers the public interest. The public character of Commission action is reflected in the introduction to the 1934 Act: "[T]ransactions in securities . . . are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions." 15 U.S.C. § 78b. Congress entrusted the Commission with the vital mission of ensuring the honesty and fairness of the capital markets. "The entire purpose and thrust of a [Commission] enforcement action is to expeditiously safeguard the public interest by enjoining securities violations. The claims asserted in such an action stem from, and are

colored by, the intense public interest in [Commission] enforcement of these laws." *SEC v. Asset Management Corp.*, 456 F. Supp. 998, 1000 (S.D. Ind. 1978). Focusing on this public interest, a number of district courts have refused to hold the Commission to a statute of limitations. *See, e.g., SEC v. Keating*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,906, at 93,751 (C.D. Cal. July 23, 1992); *SEC v. Willis*, 777 F. Supp. 1165, 1174 (S.D.N.Y. 1991) (*Willis*); *SEC v. Glick*, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,535, at 97,794 (D. Nev. June 12, 1980) (*Glick*).

Disgorgement plays a central role in the enforcement of the securities laws. "The effective enforcement of the federal securities laws requires that the [Commission] be able to make violations unprofitable. The deterrent effect of [a Commission] enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits." *Manor Nursing*, 458 F.2d at 1104. By deterring violations of the securities laws, disgorgement actions further the Commission's public policy mission of protecting investors and safeguarding the integrity of the markets. Although the Commission at times may use the disgorged proceeds to compensate injured victims, this does not detract from the public nature of Commission enforcement actions: "the touchstone remains the fact that public policies are served and the public interest is advanced by the litigation." *Local 427*, 894 F.2d at 612.

Imposing a state or any other statute of limitations on Commission civil enforcement actions would also conflict with the underlying policies of the securities laws; this conclusion strongly negates any inference that Congress

intended a limitations period to apply. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977) (*Occidental*). In *Occidental*, the Court refused to apply state limitations periods to employment discrimination suits brought by the EEOC pursuant to Title VII. The Court concluded that borrowing state statutes would frustrate federal policy and congressional intent for two reasons. First, federal law required the EEOC to investigate and attempt to resolve administratively claims of employment discrimination before bringing suit. *Id.* at 368. Second, the EEOC already faced a severe backlog of cases when Congress extended the coverage of Title VII and authorized the EEOC to bring civil enforcement actions in federal court. *Id.* at 369-71. These two factors indicated that Congress could not have intended state statutes of limitations, some as short as one year, to apply to EEOC actions. *Id.* at 370-71. The Court therefore concluded that no statute of limitations applied. *Id.* at 372.

The same result is appropriate in this case. As with the EEOC, the Commission must expend considerable time and energy investigating alleged violations of the securities laws. Unlike the typical case of employment discrimination, securities fraud may involve multiple parties and transactions of mind-boggling complexity. Market manipulation is notoriously hard to detect. Placing strict time limits on Commission enforcement actions therefore would quite plainly "frustrate or interfere with the implementation of national policies." *Id.* at 367. In addition, although the Commission is not obligated to try to negotiate a settlement as is the EEOC, as a practical matter, the Commission often attempts settlement in order to avoid costly and time-consuming litigation. In

this case, for example, the Commission settled with 12 of Rind's co-defendants. Finally, Rind correctly points out that the Commission could not have had a backlog of cases when the 1933 and 1934 Acts were enacted because these statutes created the Commission. However, Congress gave the Commission a broad mandate to regulate the securities market, and it is consistent with the structure of the statutes to assume that Congress did not include express statutes of limitations out of a fear that the fledgling agency would soon be swamped with cases. Therefore, *Occidental* supports the conclusion that no statute of limitations should apply to Commission civil enforcement actions.

We hasten to add that our holding here will not open the door to the prosecution of stale claims. A court can and should consider the remoteness of the defendant's past violations in deciding whether to grant the requested equitable relief. *See Willis*, 777 F. Supp. at 1174; *Glick*, [1980 Transfer Binder] Fed. Sec. L. Rep. at 97,794. Although no fixed period of limitations governs Commission actions, a court may exercise its discretion to limit the Commission's power to seek relief. *Cf. Occidental*, 432 U.S. at 373 (suggesting that federal courts have "discretionary power" to take EEOC delay in filing suit into account when fashioning relief).

III

Rind also argues that 28 U.S.C. § 2415(b) bars the Commission's action in this case. Section 2415(b) provides with some exceptions, that "every action for *money damages* brought by the United States or an officer or

agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues." (Emphasis added.)

Even assuming securities fraud fits within the definition of "tort" for purposes of section 2415(b), the statute by its terms only covers suits for money damages. As we shall explain, disgorgement is a form of injunctive relief. Section 2415(b) is therefore inapplicable.

IV

The Seventh Amendment provides that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. Rind contends that when the Commission sues for disgorgement it is really after money damages and that he is therefore entitled to a trial by jury. Entitlement to a jury trial in federal court is a question of law reviewed de novo. *Adams v. Johns-Manville Corp.*, 876 F.2d 702, 704 (9th Cir. 1989).

Two issues are to be addressed in determining whether the right of trial by jury attaches to a statutory claim. First, we must "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity." *Tull v. United States*, 481 U.S. 412, 417 (1987). Second, we must "examine the remedy sought and determine whether it is legal or equitable in nature." *Id.* at 417-18. The second inquiry is more important. *Id.* at 421.

We agree with the Second Circuit that a defendant is not entitled to a jury trial where the Commission sues for

disgorgement of illicit profits. *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 95-96 (2d Cir. 1978) (*Commonwealth*). There is no dispute that the right to a jury trial does not attach to purely injunctive actions brought by the Commission. *Bradford v. SEC*, 278 F.2d 566, 567 (9th Cir. 1960). The same result should apply in a disgorgement action, for several reasons. First, we have already held that disgorgement of profits is one part of the Commission's power to obtain injunctive relief. *SEC v. Clark*, 915 F.2d 439, 453 (9th Cir. 1990). Second, the Supreme Court has observed that actions for disgorgement of improper profits are equitable in nature. *See Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990). Third, the fact that disgorgement involves a claim for money does not detract from its equitable nature: in such an action, "the court is not awarding damages to which plaintiff is legally entitled but is exercising the chancellor's discretion to prevent unjust enrichment." *Commonwealth*, 574 F.2d at 95. An action by the Commission "is decidedly more analogous to the traditional jurisdiction of equity to award restitution." *Id.* at 96. Rind does not have a right of trial by jury.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 90-4361-HLH

Date July 29, 1991

Title SEC v. Rind

DOCKET ENTRY

PRESENT:
HON. BARRY L. HUPP, JUDGE

Milli Borgarding
Deputy Clerk

/s/ Julie Churchill
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Karen Matteson

ATTORNEYS PRESENT FOR DEFENDANTS:

Edward Gartenberg

PROCEEDINGS:

1. SEC's Renewed Motion To Strike Statute of Limitations Defense

2. Rind's Motion For Judgment On The Pleadings

ORDER (also, if applicable, findings and memorandum opinion):

The motion by plaintiff SEC to strike the 4th and 6th affirmative defenses (statute of limitations) of defendant Rind is granted; said defenses are stricken. The motion of defendant Rind for judgment on the pleadings is denied.

The court determines that the one year-three year limitations rule adopted by the Supreme Court in the recent *Lampf* case does not apply to a §10(b) action brought by the SEC for equitable relief.

As the court is sure counsel agree, it is time to decide the limitations problem at this judicial level. The matter has been before the court in the form of several motions. In January, the court postponed final decision on the matter to await the Supreme Court's decisions in *Lampf* 6/20/91 59 USLW 4688. Then, it was recognized that *Lampf* (referred to the transcript of the 1/28/91 hearing as *Reitz*, the name of the case in the Court of Appeals) might or might not give guidance for this issue, since it dealt with a private 10(b)(5) action. As it turns out, *Lampf* does not give decisive guidance although a few clues can be found therein. Thus, the court must forge its own way on this question.

The court was at first incredulous at the position of the SEC that no limitations period at all governs actions brought by the SEC under §10(b). That viewpoint has had to be modified in view of the SEC citation to *Occidental Life Ins.* '77 53 LEd2d 402, wherein the EEOC was held not to be bound by a limitations period in bringing a Title VII action. At the 1/28/91 motion hearing, the court discussed with counsel its view that, absent definitive language in *Lampf*, the *Occidental* approach must be applied here. That approach was to analyze the terms of a congressionally created action to determine whether Congress, in the absence of a statutorily provided limitations period, meant for one to be applied. That issue is not decided solely from recognizing that Congress did not

enact one; the purpose and function of the congressionally created claim must be analyzed. The Supreme Court had long implied limitations periods to congressionally created claims where Congress failed to put one in expressly; perhaps this is based on the same sense of incredulity initially felt by the court in this case to the thought that there could be such a thing as a claim without a limitations period. From the cases, it appears that the implied limitations periods are virtually universally found where the congressional enactment creates a private claim or where it is construed to do by judicial decision (as in the case of §10(b)). There has been a long running debate as to whether the implied statute should be the most analogous state statute or one "found" by analogy in the federal statute. The latter has been most in fashion recently, as confirmed by the decision in *Lampf*. However, *Occidental* makes it clear that where actions brought by the government are concerned, the approach is not necessarily the same. Where Congress does not specify a limitations period, the purpose of the statute and the operation of the enforcement mechanism is consulted to see if the implication of a limitations period is consistent with congressional intent.

Lampf does not help with this analysis except to recognize in footnote 3 the *Occidental* rule that "on rare occasions" it is recognized that no time limitation be construed to bind government agencies. This would seem to torpedo the SEC position that the government is never bound by limitations unless Congress expressly says so, but makes it nevertheless necessary to consult the purpose of the statute. *Lampf* itself makes it clear that it is confined to private actions. Not only is this clear in the

express language defining the issue at the start of the opinion, but is also clear from the majority's reasoning (distinguishing the court created private remedy from the congressionally created SEC remedy).

Neither does the statutory history cited by counsel assist much. At the 1/28/91 hearing, the court asked counsel to see what could be found in congressional history, and the parties have worked hard at trying to do that with, it must be said, meager results. Defendant quotes a number of senators discussing what limitations should be provided for private actions, and the necessity for an overall limitations period (later adopted by the court in *Lampf* for 10(b) actions), but the discussion does not relate to the needs of the government under 10(b) actions, for which those same senators provided no limitations period at all. If anything, the showing favors the converse of defendant's view – the need for a limitations period having been recognized and dealt with as to private actions, the failure to provide one for SEC actions appears more deliberate. Another aspect of congressional history is cited involving the 1988 insider statute, where a 5 year overall statute was adopted for government action with a disclaimer of intent to affect prior law in other respects than insider actions. There may be a tendency for this to show that Congress again had its attention drawn to the limitations problems in securities litigation and, with knowledge that the statute set forth no limitations periods in government 10(b) litigation, did nothing about it (implying, possibly, that no limitations period was intended).

The government pushes hard for application of the "legal-equitable" dichotomy, recognizing the usual view

that equitable claims are not traditionally bound by limitations period, but rather by laches (which it says does not bind the government). Of course, this court recently held that the case was equitable for purposes determining whether defendant had a right to jury trial. However, the SEC argument that result should also govern the limitations question is not accepted. If *Occidental* is accepted as the basis for analysis, then the label "legal" or "equitable" does not govern the result, as it did not in *Occidental* (which was an equitable action created by statute where no jury is allowed). Instead, the result is governed by deduced congressional intent.

Prior reported opinions are of no help. There are no appellate opinions. There are a clutch of district court opinions which state that the government is not bound by limitations. The court does not find them particularly useful, since they mostly rely on *Summerlin*, which, as the court has stated often before, is in its opinion not applicable. And, since *Lampf, Summerlin* is surely not applicable since it deals with state statutes of limitation. No district court opinion has analyzed the question from an *Occidental* approach, so far as the court is aware.

Applying the *Occidental* approach to the facts of this case, the court believes that it is not congressional intent that the one year from knowledge but three year maximum limitations period should be applicable to actions brought by the SEC to enforce §10(b). While the SEC does not have the administrative proceedings to go through before suit which convinced the Supreme Court in *Occidental*, it does have considerations of criminal law enforcement to consider. This case, typical of many, was preceded by criminal court action during the pendency of

which the SEC, for both legal and practical reasons, would have been inhibited in bringing a civil enforcement action. Not only was that true in this particular action, it will be true in many actions where the SEC is concerned with the public being mulcted by fraud, also of interest to the Department of Justice. Thus, a one year limitations period appropriate for private litigation does not appear to be appropriate for the SEC. In addition, unlike private litigation, which is usually concerned with a one incident fraud, the SEC case will normally be far broader in scope, considering how a whole business, or even a whole industry, has operated over a period of time. Thus, more investigation time than allowed by a one year limitations period, appears appropriate. Further, the facts giving rise to the claim may not be available to the SEC on a timely basis, where at least the fact of fraud and the realization of damage will be painfully brought home to the individual private potential plaintiff. The court concludes that the one year-three year limitations period for private actions is not intended by Congress to be applied to the SEC.

Defendant suggests that this Court apply the three year limitation period found in 28 U.S.C. § 2415. The court rejects this idea. By its terms, section 2415 applies to tort actions brought by the government for money damages. Therefore, even if the court were to analogize this securities fraud action to a tort action for fraud, the section is inapplicable because the court has already determined that this is an equitable action.

The parties have not suggested other limitations periods which may be applicable since defendant argues for the private action period and plaintiff argues for none

at all. It may be that there is an overall limitation period susceptible to being applied to SEC actions. The court hopes so. That question is not posed on these motions.

If either party desires, the court will certify this question for an interlocutory appeal, the court believing that it poses an [sic] controlling question of law as to which the correct answer is unclear. If this question is certified, the jury trial question should also be certified for the same appeal. (The court would not certify the jury trial issue by itself, but thinks that it is properly certifiable with the limitations issue). Any such application may made be ex parte containing a form of order with appropriate findings, but with 5 days notice for the other side to comment.

This minute order is the court's decision and order in the matter; no more formal order is required, and it is final this date for interlocutory appeal purposes.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. MAURICE RIND, Defendant.	CASE NO. 90-4361 HLH (Sx) ORDER CERTIFYING ISSUES FOR INTERLOCUTORY APPEAL (Filed Aug. 2, 1991)

IT IS HEREBY ORDERED that the following issues are hereby certified for interlocutory appeal because each of these issues involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the court's orders with respect to these issues may materially advance the ultimate termination of the litigation:

1. Whether the action and/or request for disgorgement of the United States Securities and Exchange Commission is subject to a statute of limitations;

2. Whether defendant Maurice Rind is entitled to judgment on the pleadings or partial judgment on the pleadings based upon a statute of limitations; and

3. Whether Maurice Rind is entitled to trial by jury in an action brought by the United States Securities and Exchange Commission for disgorgement.

8/2/91

/s/ Harry L. Hupp
United States District Judge

Presented by:

BURRIS, DRULIAS & GARTENBERG

By:/s/ Edward Gartenberg
Edward Gartenberg
Attorneys for Defendant
Maurice Rind

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Respondent, vs. MAURICE RIND, Defendant-Petitioner.	No. 91-80310 DC# CV-90-4361-HLH Central California ORDER (Filed Sep. 4, 1991) NEW CASE#: 91-55972

Before: FLETCHER and T.G. NELSON, Circuit Judges.

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Petitioner shall perfect the appeal pursuant to Fed. R. App. P. 5(d).

No. 93-97

Supreme Court, U.S.
FILED
OCT 18 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

MAURICE RIND, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether a civil law enforcement action by the Securities and Exchange Commission seeking an injunction against future violations of the federal securities laws and disgorgement of unlawful profits is subject to a statute of limitations.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Aaron v. *SEC*, 446 U.S. 680 (1980)	18
American Constr. Co. v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372 (1893)	7
Bowen v. *Massachusetts*, 487 U.S. 879 (1988)	19
Brotherhood of Locomotive Firemen v. *Bangor & Aroostock R.R.*, 389 U.S. 327 (1967)	7
Cannon v. *University of Chicago*, 441 U.S. 677 (1979)	11
Chesapeake & Deleware Canal Co. v. *United States*, 250 U.S. 123 (1919)	11
Davis v. *Corona Coal Co.*, 265 U.S. 219 (1924)	11
Dole v. *Local 427, International Union of Electrical Workers*, 894 F.2d 607 (3d Cir. 1990)	10, 11
Donovan v. *Square D Co.*, 709 F.2d 335 (5th Cir. 1983)	10
Donovan v. *West Coast Detective Agency, Inc.*, 748 F.2d 1341 (9th Cir. 1984)	10
E.I. Dupont de Nemours & Co. v. *Davis*, 264 U.S. 456 (1924)	11
Elkind v. *Liggett & Myers, Inc.*, 635 F.2d 156 (2d Cir. 1980)	14
Franklin v. *Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992)	17
General Motors Corp. v. *United States*, 496 U.S. 530 (1990)	11-12
Guaranty Trust Co. v. *United States*, 304 U.S. 126 (1938)	10

Cases—Continued:

	Page
Hamilton-Brown Shoe Co. v. *Wolf Brothers & Co.*, 240 U.S. 251 (1916)	7
Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 111 S. Ct. 2773 (1991)	4, 7
Marshall v. *Intermountain Electric Co.*, 614 F.2d 260 (10th Cir. 1980)	10
Musick, Peeler & Garrett v. *Employers Insurance*, 113 S. Ct. 2085 (1993)	18
Occidental Life Insurance Co. v. *EEOC*, 432 U.S. 355 (1977)	5, 14, 15, 16
Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 (1941)	15
Russello v. *United States*, 464 U.S. 16 (1983)	12
SEC v. *Blavin*, 760 F.2d 706 (6th Cir. 1985)	13
SEC v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90 (2d Cir. 1978)	13
SEC v. *Continental Advisers*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,489 (D.D.C. June 29, 1978)	8
SEC v. *Courtois*, [1984-85 Transfer Binder] (CCH) Fed. Sec. L. Rep. ¶ 92,000 (S.D.N.Y. Apr. 11, 1985)	13-14
SEC v. *Egan*, 1992 U.S. Dist. LEXIS 19380 (N.D. Ill. Dec. 15, 1992)	8
SEC v. *Elderkin*, No. 91-1245WD (W.D. Wash. Jan. 30, 1992)	8
	8
SEC v. *Glick*, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,535 (D. Nev. June 12, 1980)	8
SEC v. *Hayes*, 1991 U.S. Dist. LEXIS 19859 (N.D. Tex. July 25, 1991), aff'd, No. 92-1027 (5th Cir. Sept. 21, 1993)	8
SEC v. *Keating*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,906 (C.D. Cal. July 23, 1992)	8
SEC v. *O'Hagan*, 793 F. Supp. 218 (D. Minn. 1992)	8
SEC v. *Penn Central Co.*, 425 F. Supp. 593 (E.D. Pa. 1976)	8, 13

Cases—Continued:

	Page
SEC v. *Penn Central Co.*, 450 F. Supp. 908 (E.D. Pa. 1978)	13
SEC v. *Polevoi*, Civ. Action No. 89-1001 RJK (Sx) (C.D. Cal. Sept. 19, 1989 and Sept. 18, 1990)	2
SEC v. *Powers Securities Corp.*, Civ. Action No. 90-S-1579 (D. Colo. Aug. 26, 1991)	8
SEC v. *Tome*, 833 F.2d 1086 (2d Cir. 1987), cert. denied, 486 U.S. 1014 (1988)	13
SEC v. *Toomey*, 1992 U.S. Dist. LEXIS 11826 (S.D.N.Y. Aug. 7 1992)	8
SEC v. *Washington County Utility District*, [1982-83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,112 (E.D. Tenn. Dec. 2, 1982)	8
SEC v. *Willis*, 777 F. Supp. 1165 (S.D.N.Y. 1991)	8
United States v. *Knight*, 39 U.S. (14 Pet.) 301 (1840)	10
United States v. *Minkow*, Crim. No. 88-22 (a)-DT (C.D. Cal. Mar. 28, 1989)	2
United States v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120 (1886)	11
	11
United States v. *Summerlin*, 310 U.S. 414 (1940)	10
United States v. *Whited & Wheless, Ltd.*, 246 U.S. 552 (1918)	11
Westnau Land Corp. v. *United States Small Business Administration*, 1993 U.S. App. LEXIS 19489 (2d Cir. July 28, 1993)	10, 11, 19

Statutes and regulations:

Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677:	
15 U.S.C. 78t-1	17
15 U.S.C. 78t-1(b)(2)	18
Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264	12
Securities Act of 1933, 15 U.S.C. 77a *et seq.*:	
§ 13, 15 U.S.C. 77m	11
§ 17(a), 15 U.S.C. 77q(a)	3

Statutes and regulations—Continued: Page

§ 20(b), 15 U.S.C. 77t(b) 2, 4, 8, 11, 15, 17, 18
Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:
§ 9(e), 15 U.S.C. 78i(e) 7, 11
§ 10(b), 15 U.S.C. 78j(b) 3, 4, 7, 9, 10, 16, 17, 18
§ 13(a), 15 U.S.C. 78m(a) 3
§ 13(b)(2), 15 U.S.C. 78m(b)(2) 3
§ 16(b), 15 U.S.C. 78p(b) 11
§ 18(c), 15 U.S.C. 78r(c) 11
§ 20A(b)(2), 15 U.S.C. 78t-1(b)(2) 18
§ 21, 15 U.S.C. 78u 4
§ 21(d)(1), 15 U.S.C. 78u(d)(1) (Supp. III 1991) 2, 4, 8, 11, 12, 15, 17, 18
§ 21A, 15 U.S.C. 78u-1 12
§ 21A(d)(5), 15 U.S.C. 78u-1(d)(5) 12
§ 27A(a), 15 U.S.C. 78aa-1(a) (Supp. III 1991) 9
28 U.S.C. 2415 19
28 U.S.C. 2415(b) 6
17 C.F.R.:
Section 240.10b-5 3
Section 240.12b-20 3
Section 240.13a-13 3
Section 240.13b2-1 3

Miscellaneous:

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S. Rep. No. 167, 102d Cong., 1st Sess. (1991) 9
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 7

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-97

MAURICE RIND, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-16, is reported at 991 F.2d 1486. The order and memorandum opinion of the district court, Pet. App. 17-23, is unofficially reported at [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,168.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1993. The petition for a writ of certiorari was filed on July 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 15, 1990, the Securities and Exchange Commission (SEC or Commission) filed the complaint in this civil law enforcement action pursuant to Section 20(b) of the Securities Act of 1933 (Securities Act), 15 U.S.C. 77t(b), and Section 21(d)(1) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78u(d)(1) (Supp. III 1991). The original complaint alleged that petitioner and 13 other defendants had engaged in securities fraud and various reporting and record-keeping violations of the federal securities laws in connection with the activities of ZZZZ Best Co.[1] Twelve of the defendants consented to judgments against them and the thirteenth defaulted. The amended complaint therefore named only petitioner as a defendant. Pet. App. 3-4.

The amended complaint alleged that petitioner had played an integral part in creating and disseminating certain fraudulent representations that enabled ZZZZ Best Co. to overstate the value of its assets when making a public offering of securities, in meeting the requirements for listing on the National Association of Securities Dealers, Inc. Automated Quotation System, and in filing subsequent financial statements

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[1] A number of the defendants, including Barry Minkow, the founder of the company, were convicted on related criminal charges. Minkow was sentenced to a jail term of 25 years. *United States* v. *Minkow*, Crim. No. 88-22(a)-DT (C.D. Cal. Mar. 28, 1989). In a separate Commission action, the Commission was granted summary judgment ordering two other persons involved in the company's fraudulent activities to disgorge a total of approximately $225,000. *SEC* v. *Polevoi*, Civ. Action No. 89-1001 RJK (Sx) (C.D. Cal. Sept. 19, 1989 and Sept. 18, 1990).

with the Commission. The complaint alleged that petitioner's conduct violated the antifraud provisions of Section 17(a) of the Securities Act, 15 U.S.C. 77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5; the reporting provisions of Section 13(a) of the Exchange Act, 15 U.S.C. 78m(a), and Rules 12b-20 and 13a-13, 17 C.F.R. 240.12b-20 and 240.13a-13; and the record-keeping provisions of Section 13(b)(2) of the Exchange Act, 15 U.S.C. 78m(b)(2), and Rule 13b2-1, 17 C.F.R. 240.13b2-1. The complaint sought a permanent injunction prohibiting petitioner from violating various provisions of the federal securities laws in the future and requiring him to disgorge any unlawful gains. Pet. App. 4.

2. In the district court, based on the premise that the Commission's claim for disgorgement is no different than a private action for damages, petitioner asserted several statute of limitations defenses. The district court granted the Commission's motion to strike petitioner's statute of limitations defenses and denied his motion for judgment on the pleadings based on the statute of limitations. The court held that no statute of limitations applies to this Commission action. Pet. App. 17-23. It then certified for interlocutory appeal two questions relating to whether Commission actions requesting disgorgement are subject to a statute of limitations, *id.* at 24-25, and the court of appeals granted permission to appeal.[2] *Id.* at 26.

[2] The district court also certified for interlocutory appeal the question whether there is a right to a jury trial in a Commission action seeking disgorgement. Pet. App. 25. The court of appeals upheld the district court's conclusion that

3. The court of appeals affirmed. Pet. App. 1-16. It rejected petitioner's argument that the limitations period for implied private rights of action under Section 10(b) of the Exchange Act established by this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), also applies to civil law enforcement actions seeking disgorgement, which are brought by the Commission pursuant to Section 20(b) of the Securities Act and Section 21(d)(1) of the Exchange Act. Pet. App. 5-9. The court of appeals noted that this Court explicitly limited its holding in *Lampf* to private suits brought under Section 10(b). Pet. App. 7-8. The court of appeals then contrasted implied private rights of action with the authority expressly granted to the Commission by Section 21 of the Exchange Act to enforce the securities laws and concluded that the reasoning in *Lampf* does not apply to Commission actions. Pet. App. 8-9.

The court explained that a private damages action focuses on how much the plaintiff was injured by the defendant's illegal conduct and whether that injury can be quantified, while a Commission action to enforce the federal securities laws promotes economic and social policies independent of the claims of individual investors. Pet. App. 8-9. Disgorgement, the court of appeals noted, is sought "in order to deprive the wrongdoer of his or her unlawful profits and thereby eliminate the incentive for violating the securities laws." *Id.* at 9. The court stated that "[t]he theory behind the remedy is deterrence and not

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there is no right to a jury trial in such Commission actions, *id.* at 15-16, and petitioner has not sought review of that portion of the court of appeals' decision in this Court.

compensation." *Ibid.* Accordingly, the court of appeals rejected petitioner's analogy between disgorgement and money damages.

The court of appeals also reasoned that, in light of the pattern of explicit time limits for express private actions and Congress's attention to limitation issues in the Securities Act and the Exchange Act, the omission of any explicit time limit on Commission enforcement actions should "be interpreted as deliberate." Pet. App. 10. The court found additional support for its conclusion in the well-established principle that, in the absence of an express statute of limitations, no limitations period binds the United States when it sues to vindicate a public right or interest. *Id.* at 10-11. The court explained that "[d]isgorgement plays a central role in the enforcement of the securities laws" because it makes violations unprofitable. *Id.* at 12. That the Commission may, in its discretion, use disgorged proceeds to compensate injured victims does not detract from the public purpose of its enforcement actions. *Ibid.*

The court of appeals also drew on this Court's reasoning in *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977). There, the Court rejected the application of state limitations periods to employment discrimination suits brought by the EEOC, pointing out that practical concerns suggested that those limitations periods would frustrate federal policy. Pet. App. 13. In this case, the court of appeals found that practical considerations also counsel against placing strict time limits on Commission actions. The Commission must investigate "multiple parties and transactions of mind-boggling complexity," and it often attempts to resolve these complex matters by settlement, before litigation. *Ibid.*

The court of appeals dismissed the suggestion that the absence of a specific limitations period would encourage the Commission to bring stale claims. It noted that a court "can and should consider the remoteness of the defendant's past violations in deciding whether to grant the requested equitable relief." Pet. App. 14.

Finally, the court of appeals rejected the contention that the limitations period in 28 U.S.C. 2415(b) for tort suits by the United States applies to law enforcement actions brought by the Commission. The court noted that that limitations period applies only to suits for money damages; because disgorgement is a form of injunctive relief, not money damages, Section 2415(b) is inapplicable. Pet. App. 14-15.[3]

ARGUMENT

The court of appeals' holding—that this action by the Commission seeking equitable relief, including disgorgement, is not barred by a statute of limitations—is correct and rests on well-settled principles applicable to government actions enforcing public rights. Petitioner's principal contention (Pet. 10-27) is that the court of appeals' holding conflicts with this Court's decision in *Lampf*. There is no merit to that contention, because *Lampf* involved only private actions that are judicially implied, not Commission actions that are expressly authorized by statute. Moreover, as petitioner acknowledges, Pet. 3, since the court of appeals' decision resolved an "issue of first impression" at the appellate level, Pet. App. 3,

[3] On remand, the district court denied the Commission's motion for summary judgment and concluded that there were genuine issues of fact for trial. A pre-trial conference is scheduled for February 1994.

there is no conflict with any decision of another court of appeals. Further review of the court of appeals' interlocutory ruling is therefore not warranted.[4]

1. In *Lampf*, this Court determined that the pattern of limitations that Congress imposed on all but one of the express private rights of action in the Exchange Act and the Securities Act (one year from discovery of the fraud or three years from its occurrence) provided the best guide to what Congress would have done if it had considered a limitations period for a private right of action under Section 10(b) of the Exchange Act. 111 S. Ct. at 2780-2781. For that reason, the Court concluded that the one-year/three-year limitations period contained in Section 9(e) of the Exchange Act, 15 U.S.C. 78i(e), should also be applied to implied private rights of action seeking damages under Section 10(b) of that Act. The Court expressly noted in *Lampf* that it was dealing with the issue of "which statute of limitations is applicable to a private suit brought pursuant" to Section 10(b). 111 S. Ct. at 2776. *Lampf* did not present the issue raised by petitioner—whether civil law enforcement actions by the Commission seeking equitable relief, brought pursuant to express author-

[4] On remand from the court of appeals, the district court denied the Commission's motion for summary judgment and determined that the case should go to trial. See note 3, *supra*. This Court's usual practice is to refrain from reviewing interlocutory decisions, see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.18, at 224-226 (6th ed. 1986), and there is no reason to depart from that practice here.

ity under Section 20(b) of the Securities Act and Section 21(d)(1) of the Exchange Act, are subject to a limitations period.

Every court that has addressed the question has concluded, as did the court of appeals in this case, that Commission civil law enforcement actions seeking equitable relief are not subject to any statute of limitations.[5] Congress has also viewed *Lampf* as

[5] *SEC* v. *Egan*, 1992 U.S. Dist. LEXIS 19380 (N.D. Ill. Dec. 15, 1992) (*Lampf* does not apply to Commission actions seeking disgorgement, nor does any other statute of limitations govern such actions); *SEC* v. *Toomey*, 1992 U.S. Dist. LEXIS 11826 (S.D.N.Y. Aug. 7, 1992) (no federal or state statute of limitations is applicable to Commission actions); *SEC* v. *O'Hagan*, 793 F. Supp. 218 (D. Minn. 1992) (rejecting reliance on *Lampf*); *SEC* v. *Elderkin*, No. 91-1245WD (W.D. Wash. Jan. 30, 1992) (same); *SEC* v. *Powers Securities Corp.*, Civ. Action No. 90-S-1579 (D. Colo. Aug. 26, 1991) (same); *SEC* v. *Willis*, 777 F. Supp. 1165, 1174-1175 (S.D.N.Y. 1991) (holding that neither a statute of limitations nor the doctrine of laches applies to Commission actions seeking disgorgement); *SEC* v. *Hayes*, 1991 U.S. Dist. LEXIS 19859 (N.D. Tex. July 25, 1991) (same), aff'd on other grounds, No. 92-1027 (5th Cir. Sept. 21, 1993) (unpublished); *SEC* v. *Continental Advisers*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,489, at 93,819 (D.D.C. June 29, 1978) (pre-*Lampf*, holding that state statutes of limitations do not apply to Commission actions seeking disgorgement); *SEC* v. *Penn Central Co.*, 425 F. Supp. 593, 599 (E.D. Pa. 1976) (same); *SEC* v. *Washington County Utility District*, [1982-83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,112, at 95,331 (E.D. Tenn. Dec. 2, 1982) (pre-*Lampf*, holding that injunctive actions by the SEC are not subject to state statutes of limitations or laches); *SEC* v. *Glick*, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,535, at 97,793-97,794 (D. Nev. June 12, 1980) (same). See also *SEC* v. *Keating*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,906, at 93,752 (C.D. Cal. July 23, 1992) (Rule 11 sanctions applied where defendant raised improper defenses, including statute of limitations, to

restricted to private actions. In recently amending the Exchange Act to prevent the retroactive application of *Lampf*, Congress provided that:

> The limitation period for any *private* civil action implied under section [10(b)] of this Act that was commenced on or before June 19, 1991 shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

Section 27A(a) of the Exchange Act, 15 U.S.C. 78aa-1(a) (Supp. III 1991) (emphasis added). The Senate Report on an earlier version of the legislation stated:

> The legislation will not apply to any enforcement actions brought under the Securities Exchange Act by the SEC. *SEC actions are not intended to be subject to any statute of limitations unless expressly provided by statute.*

S. Rep. No. 167, 102d Cong., 1st Sess. 206 (1991) (emphasis added). Commentators agree that no statute of limitations applies to Commission actions seeking equitable relief.[6]

2. Petitioner suggests that *Lampf* is applicable here on the theory that the same rules that govern implied private actions under Section 10(b) are

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Commission action seeking injunction and other equitable relief).

[6] See 5D A. Jacobs, *Litigation and Practice Under Rule 10b-5* § 235.01 (1993); 5 A. Bromberg & L. Lowenfels, *Securities Fraud and Commodities Fraud* § 13.2(1581)(1) (1991); American Bar Association Committee on Federal Regulation of Securities, *Report of the Task Force on Statutes of Limitations for Implied Actions*, 41 Bus. Law. 645, 646 n.7 (1986).

equally applicable to Commission actions to enforce Section 10(b). Pet. 10-11, 14-16, 17. He argues (Pet. 11) that "[a]bsent a specific legislative enactment exempting the SEC from this statute of limitations, the SEC should enjoy no special judicial favor." Petitioner's argument is contrary to established law.

Actions by the government to enforce sovereign rights are not governed by statutes of limitations, absent explicit provision to that effect by Congress. *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940); *United States* v. *Knight*, 39 U.S. (14 Pet.) 301, 315 (1840). That rule responds to the policy that public rights, which serve the interest of citizens at large, should not be inadvertently compromised by the neglect or delay of the officials administering the law. *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938); *Knight*, 39 U.S. (14 Pet.) at 315. Courts have applied that rule in a variety of statutory contexts. *Dole* v. *Local 427, International Union of Electrical Workers*, 894 F.2d 607 (3d Cir. 1990) (Labor-Management Reporting and Disclosure Act of 1959); *Donovan* v. *West Coast Detective Agency, Inc.*, 748 F.2d 1341, 1343 (9th Cir. 1984) (same); *Donovan* v. *Square D Co.*, 709 F.2d 335, 340-341 (5th Cir. 1983) (Occupational Safety and Health Act of 1970); *Marshall* v. *Intermountain Electric Co.*, 614 F.2d 260, 263 (10th Cir. 1980) (same). See also *Westnau Land Corp* v. *United States Small Business Administration*, 1993 U.S. App. LEXIS 19489 (2d Cir. July 28, 1993) (applying doctrine to action by SBA to foreclose on mortgage).[7]

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[7] Petitioner contends (Pet. 23) that *Summerlin* and *Guaranty Trust* have no application here, because those cases rejected arguments for application of state statutes of limita-

The doctrine that no statute of limitations binds the government when it sues in its sovereign capacity, unless a limitations period is expressly imposed, was well established long before the Securities Act and the Exchange Act became law. *E.g.*, *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886); *United States* v. *Whited & Wheless, Ltd.*, 246 U.S. 552, 561 (1918); *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U.S. 123, 125 (1919); *E.I. Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924); *Davis* v. *Corona Coal Co.*, 265 U.S. 219, 222-223 (1924). Congress, which is presumed to be familiar with the law, *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979), provided no statute of limitations for Commission actions seeking equitable relief, 15 U.S.C. 77t(b), 78u(d)(1) (Supp. III 1991), although it did provide statutes of limitations for the express private rights, 15 U.S.C. 77m, 78i(e), 78p(b), and 78r(c). Congress's determination not to impose a statute of limitations on Commission actions must therefore be viewed as a deliberate one.[8] See *General Motors*

tions to government actions, while petitioner invokes a federal statute of limitations. That purported distinction ignores the purpose of the underlying doctrine of those cases: to protect the public against the loss of an otherwise valid claim through the inadvertence of officials. It furthers that purpose to reject application of *any* limitations period, federal or state, when Congress has not provided one. The lower courts have so held. See *Dole*, *supra*; *Westnau*, *supra*.

[8] Relying on a commentator's discussion of the legislative history of the Securities Act and the Exchange Act, petitioner argues (Pet. 25-27) that Congress intended to impose a limitations period on Commission actions. The legislative materials to which petitioner refers indicate that, among other things, Congress was concerned that individuals might be reluctant to serve as corporate directors without a time limit on their

Corp. v. *United States*, 496 U.S. 530, 538 (1990) ("Since the statutory language does not expressly impose a * * * deadline and Congress expressly included other deadlines in the statute, it seems likely that Congress acted intentionally."); *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

3. Petitioner argues (Pet. 23-24) that the sovereign rights doctrine is inapplicable here on the ground (Pet. 6, 10, 16, 21) that the Commission's request for disgorgement is equivalent to a private action for damages. There are fundamental differences, however, between Commission law enforcement actions seeking disgorgement and private damages actions brought by victimized investors. The purpose of disgorgement in a Commission action

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liability for securities law violations. But that history refers only to statutes of limitations for private actions; no limitation on Commission actions was at issue. And the balancing of interests that occurred in connection with private actions is not the same in connection with Commission civil enforcement actions.

More recent legislation adding to the Commission's enforcement powers also undercuts petitioner's position. When Congress enacted the Insider Trading Sanctions Act of 1984 (ITSA), Pub. L. No. 98-376, 98 Stat. 1264, it authorized the Commission to seek civil penalties in federal district court for insider trading, but it expressly provided a five-year limitations period for such actions. See Section 21A of the Exchange Act, 15 U.S.C. 78u-1. The limitations provision, Section 21A(d)(5), states that this Section "shall not be construed to bar or limit in any manner any action by the Commission * * * under any other provision of this [title]." 15 U.S.C. 78u-1(d)(5). That savings language would have been unnecessary if, as petitioner asserts, Commission actions under Section 21(d)(1) were subject to a limitations period shorter than the five-year ITSA period.

is to prevent the unjust enrichment of one who has profited through violations of federal law. *SEC* v. *Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987), cert. denied, 486 U.S. 1014 (1988); *SEC* v. *Blavin*, 760 F.2d 706, 713 (6th Cir. 1985); *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 102 (2d Cir. 1978); *SEC* v. *Penn Central Co.*, 450 F. Supp. 908, 916 (E.D. Pa. 1978). As one court has explained, a disgorgement action "is not one where the government seeks to serve as a conduit for individual claimants"; rather, the Commission "is attempting to enforce effectively the federal securities laws under its statutory mandate," since "disgorgement may be ordered to effectuate the enforcement of the laws by assuring that violations are not profitable." *SEC* v. *Penn Central Co.*, 425 F. Supp. 593, 599 (E.D. Pa. 1976).

The distinction between disgorgement and damages is underscored by the fact that they are calculated differently. In determining the appropriate amount of disgorgement, the focus is on how much benefit the wrongdoer obtained through his misconduct and on depriving him of that unlawful benefit. See, *e.g.*, *SEC* v. *Penn Central Co.*, 425 F. Supp. at 599. The amount of injury suffered by victims is not the measure of disgorgement, which may be unrelated to investors' losses. See, *e.g.*, *Blavin*, 760 F.2d at 713; *Commonwealth Chemical*, 574 F.2d at 102.[9] On occasion, disgorged funds are not even distributed to investors, but are paid into the United States Treasury. See

[9] The potential difference between investors' losses and the defendant's gain is illustrated by this case. While investors in ZZZZ Best Co. lost many millions of dollars, in this action against petitioner the Commission sought disgorgement only of the $700,000 profit he received.

SEC v. *Courtois*, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,000, at 90,959 (S.D.N.Y. Apr. 11, 1985). In contrast, private securities fraud damages are sought by an injured investor to make him whole. The focus of a damages calculation is usually on the injury suffered by the plaintiff and whether that injury can be reasonably quantified.[10] While private actions have an incidental public benefit, that is not the purpose of the private plaintiff's recovery.[11]

Relying on the dissent in *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 381 (1977), petitioner argues (Pet. 24) that the SEC is not acting in a sovereign capacity when seeking disgorgement. The dissenters in *Occidental* stated that an EEOC action for back pay under Title VII of the Civil Rights Act of 1964 is the equivalent of a private action, on the

[10] Petitioner states that, because private litigants can seek disgorgement as a remedy, the *Lampf* limitations period could be evaded if disgorgement actions are not subject to a limitations period. Pet. 22, citing *Elkind* v. *Liggett & Myers, Inc.*, 635 F.2d 156, 172 (2d Cir. 1980). The court in *Elkind* employed the concept of disgorgement to calculate private damages for insider trading. The use of a disgorgement measure in a private action, however, would not prevent a court from applying the appropriate statute of limitations to the case; nor would it require imposition of a statute of limitations on the Commission's civil law enforcement actions.

[11] Petitioner notes (Pet. 21-22) that equitable relief under the securities laws may be available to private litigants in certain cases, implying that there is no reason to treat Commission equitable actions differently than private actions. The availability of some kinds of equitable relief in some private cases, however, does not transform them into the equivalent of Commission actions; nor does it deprive Commission actions of their fundamentally different character as governmental actions brought for public purposes.

theory that the EEOC seeks to recover money on behalf of a private citizen, which the individual could recover himself in a separate action. That characterization of backpay failed to carry a majority of the Court in *Occidental*. Cf. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 193 (1941) (purpose of backpay award by NLRB is to vindicate public rights, not to compensate employee for damages). Nor can disgorgement at the behest of the Commission be equated with private damages, because the SEC is not vindicating private rights in seeking disgorgement.

The holding of *Occidental* supports the court of appeals' decision in this case. In *Occidental*, the Court held that no statute of limitations applies to EEOC employment discrimination actions seeking back pay and an injunction against future violations. The Court reasoned in part that federal policy would be frustrated by imposition of the proposed statutes of limitations and that they were therefore inconsistent with Congress's intent. 432 U.S. at 368-371. Likewise, it would frustrate federal policy to apply a statute of limitations to the Commission's disgorgement actions—particularly a one-year/three-year limitation period such as the one applied in *Lampf*—and it is therefore inconsistent with Congress's purpose in authorizing the SEC to enforce the law.

The Commission often coordinates its civil enforcement suits with the Department of Justice, in order to permit the institution of criminal proceedings. The same statutory provisions that authorized this Commission civil action, Sections 20(b) of the Securities Act and 21(d)(1) of the Exchange Act, also expressly authorize the Commission to transmit evidence of violations to the Attorney General, who may institute criminal proceedings. In some circum-

stances the Commission finds it necessary to delay filing its action or forgo taking investigative testimony of certain witnesses if the Department of Justice so requests, because of potential adverse effects on the criminal investigation.

In addition, some Commission actions take substantial time to prepare for filing, since they may involve a staff investigation of multiple transactions, violations, and parties; and, before an action may be commenced, the agency itself deliberates on the issue. While the Commission occasionally will be able to commence a court action soon after a violation, those cases are relatively few and generally involve a highly visible public event, such as an announced takeover of one company by another. More often, the Commission may not become aware of a violation until much later than the victims. It may not be able to commence an investigation in time to bring it to a conclusion and file the action before the running of the statute of limitations for private Section 10(b) actions. Accordingly, petitioner errs (Pet. 6, 10, 12, 14, 16, 18) in arguing that the balancing of interests in connection with a Commission action is the same as for a private damage action.

Petitioner suggests that the decision below gives the Commission "license" to bring actions many years after the violations occurred (Pet. 30) and that the agency should not be "encourag[ed]" to delay commencing securities fraud actions (Pet. 14). This Court has noted, however, that courts have discretionary power to fashion a "just result" in light of the circumstances peculiar to a case. *Occidental*, 432 U.S. at 373. As the court of appeals stated in this case, a court has the power to limit or deny relief to

the Commission if the violations are too remote. Pet. App. 14.

4. Petitioner seeks to extend *Lampf* to Commission actions by suggesting that a request for disgorgement is a "judicially-implied extension of the SEC's powers," Pet. 16, because the only remedy explicitly mentioned in the relevant provisions is an injunction, Pet. 20-22. He argues that, as in *Lampf*, the Court should therefore borrow the limitations periods that Congress applied to related express causes of action, Pet. 17, under the duty of the "federal courts * * * to limit and define the boundaries of § 10(b) litigation," Pet. 18.

The Commission, however, is not enforcing an "implied" right in this case; rather the Securities Act and the Exchange Act expressly authorize injunctive actions by the Commission. 15 U.S.C. 77t(b), 78u(d)(1). Disgorgement is an additional form of equitable relief that courts award pursuant to their general authority to grant full relief for a violation of federal law. See *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. 1028, 1035 (1992) ("[A]bsent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."). It is not, like the private right of action under Section 10(b), an implied right created and shaped by the judiciary.[12]

[12] Congress has recognized that the Commission has authority to seek disgorgement in actions to enforce the Exchange Act under Section 21(d). In the Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. 78t-1, which created a private right of action for certain insider trading violations, see *Lampf*, 111 S. Ct. at 2781, Congress provided that a defendant's total damages "shall be diminished

Accordingly, the policy considerations that led the Court in *Lampf* to harmonize the implied private right under Section 10(b) with the express private rights under the Exchange Act have no force in this context.[13]

Petitioner also argues (Pet. 20-22) that the Commission's action for disgorgement of profits from past violations should be considered to be an "implied right," on the view that it does not fit within the language of Section 20(b) of the Securities Act and Section 21(d)(1) of the Exchange Act, which apply "[w]henever it shall appear to the Commission that any person is engaged or about to engage" in a violation of the statute. Even on the assumption that

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by the amounts, if any, that such person may be required to disgorge, pursuant to a court order obtained at the instance of the Commission, in a proceeding brought under section 78u(d) of this title relating to the same transaction or transactions." 15 U.S.C. 78t-1(b)(2).

[13] Because the Commission's enforcement action is brought pursuant to express provisions of the Securities Act and the Exchange Act, petitioner's reliance (Pet. 18-19) on *Musick, Peeler & Garrett* v. *Employers Insurance*, 113 S. Ct. 2085 (1993) (considering whether contribution should be recognized under the implied private Section 10(b) right), is misplaced. The Court's acknowledgement in *Musick* of a "judicial authority to shape, within limits, the 10b-5 cause of action," 113 S. Ct. at 2089, is not applicable to the express rights of action. Nor is petitioner aided by *Aaron* v. *SEC*, 446 U.S. 680 (1980) (Pet. 11). That case held that the scienter element of Section 10(b) applies to the Commission as well as to private parties; this case does not involve construction of the elements of a Section 10(b) violation, but involves the question whether a statute of limitations judicially imposed on an *implied* private right of action should also govern a separate *express* right of action by the government.

petitioner correctly construes that language to authorize the Commission to proceed only against "ongoing conduct or threatened future conduct," Pet. 21, its requirements would be satisfied here. As petitioner acknowledges, *ibid.*, the Commission commenced its action against him, not only to obtain disgorgement, but also to obtain an injunction against future violations.

5. Finally, petitioner argues in the alternative (Pet. 28-30) that the catch-all statute of limitations in 28 U.S.C. 2415 for "money damages" in government tort actions applies to this Commission action. Pet. 28-30. The court of appeals correctly rejected that contention. Pet. App. 14-15. The Commission's request for the equitable remedy of disgorgement is not properly characterized as "money damages." See *Bowen* v. *Massachusetts*, 487 U.S. 879, 893 (1988) ("that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages'"). Accordingly, it is not subject to the catch-all provision cited by petitioner. See *Westnau Land Corp.* v. *United States Small Business Administration*, 1993 U.S. App. LEXIS 19489 (2d Cir. July 28, 1993) (rejecting argument that mortgage foreclosure was in substance the same as collection of money damages for purposes of 28 U.S.C. 2415).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1993